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**IMPORTANT CLIENT UPDATE**

**Freedom of Information Act ("FOIA") revisions (2014 PA 563)**

During the final day of the Michigan Legislature's 2014 session, the Legislature approved an amendment to the FOIA, effective July 1, 2015 (2014 Public Act 563). This amendment to the FOIA made substantial changes, particularly related to costs and fees, and placed a number of additional requirements on all public entities. The amendment requires all public bodies who charge a fee to respond to a FOIA request, to establish specific written procedures and guidelines for handling FOIA requests, including (1) a separate written summary on how to submit FOIA requests; (2) how to understand the public body's responses to FOIA requests; (3) an explanation of any fee deposit requirements; (4) adoption of a specific form for fee calculations; and (5) an explanation of methods for appealing the public body's denial or partial denial of a request, and any fee assessments.

For your consideration, we have attached a number of sample policies to meet these new requirements. The guidelines and procedures, policy summary, forms, and fee calculation worksheet form were all created using base documents cooperatively developed with the Michigan Association of Municipal Attorneys, the Michigan Township Association, and the Michigan Municipal League. Most of the documents were vetted by a substantial number of municipal attorneys. Attached is an article authored by our firm summarizing the changes in the law.

The FOIA policy and FOIA summary documents will need to be adopted by the County Board of Commissioners and, if a county website is available, included on the county website. Failure to include an online version would require that copies of these documents be provided with each response to a FOIA request. The new legislation requires a single FOIA policy and procedure, as well as uniform fee system, for each public entity. This will necessitate substantial communication between county departments that may be currently handling FOIA requests separately. Under the attached proposed FOIA Operational Policies, the county departments with access to the actual records requested would make the initial determination as to whether or not responsive documents are available and if so, what should be disclosed, redacted, or considered exempt. However, to maintain uniformity in the fee system, as required by the legislation, the fees would be calculated and the records would be forwarded by the county FOIA coordinator. It is also our recommendation that a numerical log be kept of each FOIA request so responses can be tracked on a county-wide basis. Hopefully, this will assist in assuring that there will be uniformity county-wide on how the various departments are handling FOIA requests.

The attached materials also include a draft resolution to adopt these policies and forms, which will need to be approved by the County Board of Commissioners, and incorporates approval of the various required forms( the FOIA Policies and Guidelinesand the FOIA Public Summary of Guidelines and Procedures, both of which should be posted on the county website). Included are the incorporated forms that should be utilized in responding to FOIA requests and, when possible, used for FOIA requests themselves. While individuals may request FOIA records in writing without utilizing the request form, our recommendation, if this occurs, is to have the FOIA coordinator complete the request form to track the request. The FOIA Operational Procedures policy is a suggested internal method of coordinating the FOIA responses with a county-wide FOIA policy and costing procedures consistent with the new legislation. The forms include a FOIA Cost Worksheet that provides for a separate cost evaluation that is now required for each FOIA request in order to have fees paid by a requester. The intent of the form is to allow a step-by-step approach for determining these fees for each such request for which charges will be assessed.

Most of these new changes to the law relate to the procedures required for charging requesters for public records. The fees for the labor costs for (1) locating, (2) separating, and (3) redacting records, the legislation provides that fees are to be assessed only when the cost to the county would be "unnecessarily high." In this regard, it is advisable to make a policy determination of what level labor costs for those functions are abnormal and therefore justify including such fees. For example, a determination that two (2) or more hours of labor for those aspects of addressing a FOIA request would call for the inclusion of such fees, but when less than two (2) hours are used, fees would not be charged for those labor costs. If your county desires to make such an adjustment, we can revise these policies and forms to accommodate that approach.

The attached documents have been highlighted to reflect where they would need information inserted. However, each county may have unique aspects to their situation that would require further additional adjustments. The policies, policy summary, and uniform costing form must all be in place by July 1, 2015, or the Act prohibits the public entity from assessing any charges to FOIA requesters.

The changes in FOIA are detail-oriented and have very specific requirements. The intent of these policies and forms is to provide a logical and step-by-step approach in dealing with compliance with the new amendment requirements. However, because of the complexity of these requirements, as well as the uniqueness of each county's circumstance, questions and clarifications will undoubtedly arise.

Please don't hesitate to contact us if we can assist you.

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## **MAC ARTICLE**

### **RECENT AMENDMENTS TO THE FREEDOM OF INFORMATION ACT**

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Counties and other public bodies need to prepare for substantial changes to the Freedom of Information Act (FOIA) that take effect July 1, 2015 under Public Act 563 of 2014. The statutory amendments affect the fees that may be charged for a request for public records, the documentation that must accompany a FOIA response and penalties that may be imposed. New statutory provisions also allow for a requester to challenge the fees charged. Most of the changes favor the requester, with additional significant burdens placed on the public body receiving a request for public records.

This article summarizes the major changes to FOIA under Act 563. Public officials and employees who are familiar with the FOIA process will need to carefully review the amendments, as they detail new requirements for responding to public record requests. In an upcoming article, we will address specific suggestions for compliance.

#### Procedures and Guidelines

One of the major changes to FOIA is the requirement that, in order to charge a fee for a public record search, a public body must first establish and make publicly available free copies of its procedures and guidelines to implement the FOIA process, including the use of a standard form for detailed itemization of any fee amount in its responses to written requests for public records.

A public body must also create and post on its website a written public summary of its procedures and guidelines relevant to the general public regarding how to submit written requests, and explaining how to understand the public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. This written public summary (or a website link to it) must be included in the public body's response to a FOIA record request.

#### Detailed Itemization of Fee Components

The detailed itemization must clearly list and explain the allowable charges for each of the six fee components that comprise the total fee used for estimating or charging purposes in response to a FOIA request. The six fee components include (1) labor costs for searching, locating and examining public records; (2) labor costs for separating exempt from non-exempt information; (3) the actual and most reasonably economical cost of providing records on non-paper physical media, e.g., computer discs or electronic records, if requested in that form and the public body has the technological capability of providing it in that form; (4) the actual total incremental cost of necessary duplication or publication of paper copies, not to exceed 10 cents per page for letter and legal size paper; (5) labor costs directly associated with duplication or publication of paper or electronic records; and (6) the actual cost of mailing at the least

expensive form of postal delivery. There is apparently no allowance for labor costs incurred in calculating the fees.

With regard to the three categories of labor costs (i.e., searching, separating, and copying), the public body shall not charge more than the hourly wage of its lowest-paid employee capable of performing that task in the particular instance, regardless of whether that person is available or who actually performs the labor. However, a public body may use contract labor for the separation and redaction of exempt materials, and charge its actual contract labor costs, not to exceed six times the minimum wage.

Labor costs shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits, if it clearly notes the percentage multiplier used to account for benefits in the detailed itemization.

Labor costs for searching and separating must be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. Labor costs for copying may be in any increments of the public body's choosing, but partial increments must be rounded down. A public body may not charge for redaction of documents that were already redacted in response to a previous FOIA request, if redacted copies remain in the public body's possession.

#### Waiver or Reduction of Fees

The current requirement that a public record shall be furnished without charge for the first \$20.00 of the fee for each request by an indigent person has been extended to a non-profit organization designated by the state for the protection and advocacy of persons with mental illness.

If the requestor is eligible for a requested discount, the public body must note the discount on the detailed itemization. If a requestor is ineligible for the discount, the public body must inform the requestor of the specific reason for ineligibility in the written response.

An individual is ineligible for this fee reduction if: (1) the individual has previously received discounted copies of public records from the same public body twice during that calendar year; or (2) the individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. A public body may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

#### Fee Reduction for Failure to Timely Respond

If a public body does not respond to a written request in a timely manner, the public body must reduce the charges for labor costs by 5% for each day the public body exceeds the time permitted for a response to the request, with a maximum 50% reduction, and fully note the charge reduction on the detailed itemization.



### Public Records Available Online

If the public body directly or indirectly administers or maintains an official internet presence, any public records available to the general public on that internet site at the time the request is made are exempt from any charges under FOIA. If the FOIA coordinator knows or has reason to know that all or a portion of the requested information is available on its website, the public body must notify the requestor in its written response that all or a portion of the requested information is available on its website.

The written response, to the degree practicable in the specific instance, must include a specific webpage address where the requested information is available. On the detailed itemization, the public body must separate the requested public records that are available on its website from those that are not available on the website, and must inform the requestor of the additional charge to receive copies of the public records that are available on its website.

### Verbal Requests

A public body may provide requested information available in public records without receipt of a written request. If a verbal request for information is for information that a public body believes is available on the public body's website, the public employee shall, where practicable and to the best of the public employee's knowledge, inform the requestor about the public body's pertinent website address.

### Good Faith Deposits

A public body's demand for a good faith deposit (50% of the estimated fee) must also contain a best efforts estimate by the public body regarding the time frame it will take to provide the public records to the requestor. The time frame estimate is nonbinding, but should be reasonably accurate.

If a public body has not been paid in full for copies of public records previously requested by an individual, the public body may require a deposit of up to 100% of the estimated fee before it begins a full public record search for any subsequent FOIA request from that individual, but only upon meeting several narrow conditions.

### Time of Receipt of Request

If a written request is sent by electronic mail and delivered to the public body's spam or junk-mail folder, the request is not received until 1 day after the public body first becomes aware of the written request. The public body shall note in its records both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request.

### Appeal of Fee Calculation

The FOIA amendments will now allow for challenges to fees charged by a public body. If a public body requires a fee that exceeds the amount permitted by statute or under its publicly available procedures and guidelines, the requesting person may (1) appeal to the head of the public body, if such an appeal is provided for in the procedures and guidelines; or (2) commence a civil action in the circuit court for a fee reduction.

On an appeal, the head of the public body may waive the fee, reduce the fee, or uphold the fee. If the fee is not waived, the head of the public body must certify that the fee amounts comply with the statute and the public body's procedures and guidelines.

A court may uphold or reduce the fee. If the court reduces the fee by 50% or more, it may award the requester all or an appropriate portion of reasonable attorneys' fees, costs and disbursements. If the court determines that the public body arbitrarily and capriciously charged an excessive fee, the court shall order a civil fine of \$500 against the public body.

#### Civil Fines

The amount of a civil fine that may be imposed by a court on a public body for refusal or delay in disclosing or providing copies of a public record has been increased from \$500 to \$1,000.

Further, if a court determines that a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the court may order the public body to pay a civil fine of not less than \$2,500 nor more than \$7,500 for each occurrence, taking into account the public body's budget and whether it was previously assessed penalties for FOIA violations.